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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

20 Cr. 160 (MKV)

5 SETH FISHMAN,

6 Defendant.

Trial

7 -----x

New York, N.Y.
January 31, 2022
9:20 a.m.

9 Before:

10 HON. MARY KAY VYSKOCIL,

11 District Judge
12 -and a Jury-

13 APPEARANCES

14 DAMIAN WILLIAMS

United States Attorney for the
Southern District of New York

15 BY: ANDREW C. ADAMS

SARAH MORTAZAVI

16 ANDEN F. CHOW

Assistant United States Attorneys

17 SERCARZ & RIOPELLE, LLP

Attorneys for Defendant Fishman

18 BY: MAURICE H. SERCARZ

19 -and-

LAW OFFICE OF MARC FERNICH

20 BY: MARC A. FERNICH

21
22 ALSO PRESENT: KARLINE JUNG, Paralegal Specialist
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1 (Trial resumed; jury not present)

2 THE COURT: Please state your appearances for the
3 record.

4 MR. ADAMS: Andrew Adams, Sarah Mortazavi and Anden
5 Chow for the government.

6 MR. SERCARZ: For the defendant Fishman, Maurice
7 Sercarz. Mr. Fernich is here but he just ran out of the room
8 for a moment.

9 THE COURT: Good morning.

10 It seems to me in light of the email that I received
11 this morning that we should convene in the robing room.

12 MR. SERCARZ: Yes, your Honor, that would be my
13 application.

14 THE COURT: There are just two things that I want to
15 talk about that we don't need to be in camera for, one is the
16 jurors. They're not all here yet. We told them 10 o'clock. I
17 think at a minimum we're releasing them for the day, correct?

18 MR. ADAMS: I think that's right, your Honor.

19 MR. SERCARZ: Yes, your Honor.

20 THE COURT: All right. So at 10 o'clock we will break
21 and come back in here, and I'll let the jurors know that there
22 are some issues that I need to deal with with the lawyers. And
23 so we talked about could we catch them in time, but it just
24 wasn't practical. So we'll excuse them for the rest of the
25 day.

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1 So why don't we resume then in the robing room.

2 MR. ADAMS: Thank you, your Honor. As we're on the
3 way there, I think Mr. Chow is sending an email to chambers and
4 defense counsel right now that will also relate to what we're
5 going to discuss.

6 THE COURT: All right. So I will see you all inside
7 in a moment or two.

8 (Continued on next page)

9 (Pages 1091 through 1106 SEALED by Order of the Court)

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(In open court; jury not present)

THE COURT: All right. Please be seated, everyone.

I'm told the jurors are on their way up.

(Pause)

(Jury present)

THE COURT: All right. Please be seated, everyone.

Good morning, ladies and gentlemen. I hope everyone had a nice weekend. So I'm sorry that we've kept you waiting for a few minutes this morning. It develops that there are legal issues that the Court needs to deal with with the lawyers this morning and probably for a good bit of today.

So I'm sorry that we dragged you in, but we're going to release you for the rest of the day today. I just didn't get notice of the issues in sufficient time to call you all and tell you that you didn't have to show up.

We will be planning to resume tomorrow; so if you would, please be here at 10:00 a.m. tomorrow morning. All right? So you're released for the rest of the day. Please leave your notebooks in the jury assembly room. Do not bring them home with you, and I just remind you again we are approaching the end of the trial. It remains critically important that you not discuss the case either among yourselves or with anyone at all, family members, friends, anyone, and please do not research the case. Do not read anything about the case, but enjoy the rest of your day.

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1 All right? Thank you, all.

2 JURORS: Thank you.

3 (Jury not present)

4 THE COURT: All right. Please be seated. I have one
5 quick question I'd like to talk to the lawyers about in the
6 robing room, and then we'll resume at 11:00 to talk about the
7 jury instructions. Okay?

8 (Pages 1109 through 1112 SEALED by order of the Court)

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1 (Recess)

2 (In open court; jury not present)

3 THE COURT: Please be seated, everyone.

4 MR. FERNICH: Can I have one moment for Mr. Sercarz?

5 THE COURT: Yes. I see Mr. Sercarz is still here.

6 That's what I was pausing at.

7 (Pause)

8 MR. SERCARZ: I'm en route to the hospital, your

9 Honor. I was speaking with family.

10 THE COURT: Mr. Sercarz, we're in open court.

11 MR. SERCARZ: I'm sorry, your Honor.

12 THE COURT: We are in open court. Thank you. Give me
13 one moment, please.

14 All right. So we've given everyone a copy of the
15 current version of the jury instruction, and I want to just run
16 through with you whatever edits we have made to what was
17 submitted to us over the weekend.

18 Okay. So the first is -- you all do have a black
19 line, right -- charge 5. This is not so much an edit;
20 although, there is an edit I'll talk to you about in a one
21 moment, but just a general question that I want you all to
22 focus on. Given the nature of the indictment in this case and
23 the fact that there are charges against multiple defendants,
24 it's not my intent to give the jury, at the outset, a copy of
25 the indictment, but if they ask for it, obviously, they're

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1 entitled to have it.

2 But I would suggest that it should be redacted. So if
3 you would all please focus on that and confer with one another
4 to agree upon a redacted version of the indictment that could
5 be given to the jurors, should they ask.

6 Is there any objection to not giving it in the first
7 instance?

8 MS. MORTAZAVI: No objection to that, your Honor.

9 THE COURT: All right. With respect to that charge 5
10 on page 9, we did make one edit, which is to add to Count
11 Two -- let me just find my marked up -- the language five lines
12 down we added "with intent to defraud or mislead as to Count
13 Two." It was in Count One but not in Count Two.

14 MS. MORTAZAVI: No objection to that, your Honor.

15 THE COURT: Mr. Fernich?

16 MR. FERNICH: No objection.

17 THE COURT: All right. Thank you.

18 And then we added the sentence -- you added the
19 sentence about the post-arrest conduct; so that's fine. We
20 added that? All right. The language about the post-offense
21 conduct, Count Two, is at the end of that first paragraph,
22 "Count Two also alleges that the defendant continued to commit
23 that offense after he was arrested and released on bail in this
24 case."

25 MS. MORTAZAVI: No objection from the government.

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1 THE COURT: Mr. Fernich?

2 MR. FERNICH: That's fine, Judge.

3 THE COURT: Okay. Charge 9, I will tell you, as I
4 think I said the other day, I find this a bit repetitive, but
5 it was my strong inclination this weekend not to start doing
6 line edits. You all agreed to it; so while I find it
7 repetitive, I left it alone.

8 All right. Charge 10 -- obviously, Two, in what you
9 have and what we give the jurors is we took out the
10 authorities.

11 Charge 10 on page 22. When you come over to page 24,
12 I have a question for all of you. The second full paragraph,
13 six lines down, the word "or" is underlined. Are you all --
14 hold on, I think in what you gave me, you had "and." No, I'm
15 sorry. Give me one moment. I'm in the wrong place.

16 If you come over to page 26, the first full paragraph,
17 one, two, three, four, five lines down, "prescription animal
18 drugs are misbranded if they are not administered by a licensed
19 veterinarian in the course of his professional practice, and
20 are not otherwise dispensed pursuant to a valid prescription."
21 Is it proper for it to be "and" or should it be "or"? I will
22 tell you, in all candor, we have debated this round and around.

23 MS. MORTAZAVI: I believe it should be "or," your
24 Honor and if the "and" was included, that was our error. There
25 are two circumstances where a prescription drug could be

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1 lawfully distributed, it's either with a valid written or oral
2 prescription, or if the veterinarian actually administers the
3 drug him or herself.

4 THE COURT: Yes. So your argument is the same as what
5 caused me to say it should be "or" but it may be best for you
6 to simplify this and break it into two sentences. The problem,
7 I think, with whether it should be conjunctive or disjunctive
8 is that you have "not," n-o-t, in here; so you have the
9 negative, and does that cause it to flip?

10 And I think it may be that best if you all simplified
11 it, without changing the intent but just broke it into two
12 concepts. It could be misbranded this way, and it could be
13 misbranded that way. The question is, do both of these
14 circumstances have to be present for the drug to be misbranded,
15 or only one of them?

16 MR. FERNICH: Judge?

17 MS. MORTAZAVI: Well, its --

18 MR. FERNICH: Go ahead.

19 MS. MORTAZAVI: I believe it's flipped, your Honor.
20 If either one of these circumstances are present, then the drug
21 is not misbranded.

22 THE COURT: That's the problem I'm getting at. You
23 have so many "nots" in here --

24 MS. MORTAZAVI: I understand.

25 THE COURT: -- I think I'm going to punt this one back

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1 to you all to -- Mr. Fernich, do you want to be heard?

2 MR. FERNICH: Yes, please, because with all the
3 redding and the bluing and the blacking, and in terms of the
4 fonts and what we submitted in the original joint request, I
5 just want to make sure that the record is clear what my
6 objections are. On page 24 of the charge, and this is related
7 to what we're discussing now --

8 THE COURT: Okay.

9 MR. FERNICH: -- I specifically object to the clause
10 (iv).

11 THE COURT: Okay. When you say "clause (iv)," can you
12 tell me what paragraph?

13 MR. FERNICH: I'm sorry. Yes, as your Honor -- the
14 second full paragraph.

15 THE COURT: Yes.

16 MR. FERNICH: Okay. There's a clause (iv) in there
17 that talks about being "dispensed without a valid
18 prescription."

19 And relatedly, on page 26, I object to the entire
20 paragraph we were just discussing because I don't think the
21 phrase "valid prescription" belongs in here, and as I indicated
22 in my objections originally, this language about the "valid
23 prescription" is being drawn from cases construing the
24 provision 21 U.S. Code 353(b)(1), which pertains to a human
25 doctor, human physicians.

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1 Whereas, the language at issue in our case, 21 U.S.C.
2 353(f), relating to dispensing drugs by veterinarians, the
3 provision that the government charged Fishman with violating,
4 is distinctly different, and it doesn't talk about a valid
5 prescription. And it says that it shall be dispensed only by
6 or upon a lawful written or oral order by a licensed
7 veterinarian in the course of their limited professional
8 practice.

9 THE COURT: Okay.

10 MR. FERNICH: And then it goes on to define what is or
11 is not a lawful order; so that is my objection to -- in
12 particular, to both clause (iv) and the inclusion of a
13 paragraph defining valid prescription.

14 THE COURT: Okay. It seems to me it is not impossible
15 to edit this language to track "oral or written order" to
16 address the objection and still keep the context. So I'm going
17 to ask you all -- particularly given this ambiguity of "and"
18 versus "or" -- to go back and look at these two paragraphs and
19 come back to me this afternoon.

20 MS. MORTAZAVI: Your Honor, we will do that. I want
21 to make clear of the record, because this was a paragraph that
22 we discussed with defense counsel last week, that the Court
23 does intend to include this instruction in some way, shape or
24 form, and now we're talking about the language.

25 Because I think Mr. Fernich is just renewing his

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1 objection to including any of this language at all, and I want
2 to make clear that the Court has ruled that there will be some
3 instruction and that the parties are just directed to agree on
4 language.

5 THE COURT: Some instructions about what, though?
6 Because that's the point about this, about when a drug is
7 misbranded?

8 MS. MORTAZAVI: Yes.

9 THE COURT: And specifically, clause (iv).

10 MS. MORTAZAVI: Correct and --

11 THE COURT: Yes.

12 MS. MORTAZAVI: -- Mr. Fernich has objected to the
13 government's formulation of clause (iv) and believes that this
14 paragraph on page 26 that we're discussing should be removed
15 entirely. I just want to make clear that the Court's directive
16 now is not that this paragraph will be removed entirely; only
17 that the parties should clarify the language within it.

18 THE COURT: Well, but I'm also asking you to go back
19 and look at clause (iv), and if Mr. Fernich is right, that the
20 "valid prescription" language is contained in the human drug
21 part and not the animal drug part and, instead, the animal drug
22 part talks about a "valid oral or written order by a
23 veterinarian," could you substitute that? Should that be
24 substituted for "without a valid prescription;" in other words,
25 should it say "dispensed without a valid or written order by a

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1 veterinarian"?

2 MS. MORTAZAVI: We will track the statutory language.
3 There is no objection to that from the government.

4 THE COURT: Okay.

5 MS. MORTAZAVI: Mr. Fernich wanted to insert the
6 phrase "unlawfully" for all of that.

7 THE COURT: No. "Unlawfully" is a shorthand for that.

8 MS. MORTAZAVI: Correct.

9 MR. FERNICH: That's right.

10 MS. MORTAZAVI: And we noted that in our submission to
11 the Court in tracking. That is his language. I want to make
12 clear that not is what the Court --

13 THE COURT: Correct. I am not going to say
14 "unlawful."

15 MR. FERNICH: That's fine. That was an attempt to
16 harmonize the government's request with -- to track with the
17 statute. I am fine with clause (iv) to track the language
18 statute.

19 The problem then arises is as follows. What
20 constitutes a lawful written or oral order of a licensed
21 veterinarian in the course of the veterinarian's professional
22 practice is then defined in the statute, in 353(f)(1)(B), and
23 the track explains what a lawful written or oral order is.

24 If the government wants to define that term, then the
25 paragraph on 26 should go, and it should track the definitions

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1 in B. Alternatively, it can be left undefined. I don't have a
2 position as to that. That's up to the government, but like I
3 said the other day, if we're going to do this, I think we
4 should try to get it right.

5 THE COURT: Right, of course we should try to get it
6 right.

7 MS. MORTAZAVI: Your Honor, may I interject? We have
8 had now two rounds of joint requests to charge, and we've
9 conferred with Mr. Fernich on each of those. We have accepted
10 many of his proposals and many of his line edits. I think if
11 Mr. Fernich would like to propose language on page 26 for us to
12 adopt, that is probably the most efficient way to go about it.

13 Frankly, for us to grasp at what is incorrect about
14 this paragraph and what should be included without knowing
15 exactly what Mr. Fernich's objection is, I don't think it's
16 very efficient.

17 MR. FERNICH: Well, my objection, first of all, if it
18 were up to me, as I said from the outset, including on the
19 initial joint submission, I would strike it. I would just
20 strike the paragraph out.

21 My objection is that we should not be defining the
22 phrase "valid prescription," which has nothing to do with this
23 statute.

24 THE COURT: You just said it shouldn't be "valid
25 prescription"; so we're not going to say "valid prescription."

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1 I think we just talked about we're going to change clause (iv).
2 You're going to talk, but the concept is that it's going to say
3 a valid written, oral -- I'm sorry, a valid oral or written
4 order of a licensed veterinarian.

5 And then when we come over on page 26, it should say a
6 valid oral or written order of the veterinarian is one issue in
7 the usual course of professional practice by a licensed
8 veterinarian for a legitimate medical purpose. At the same
9 time --

10 MR. FERNICH: That's what I object to.

11 THE COURT: I know you do, but I don't know what your
12 objection is, based upon a bona fide
13 veterinarian-client/patient relationship.

14 MR. FERNICH: My objection is that language is -- when
15 the government submitted the original request to charge, I
16 checked all the authorities submitted in support of it. In
17 case law, to the extent it's marshaled in support of that
18 language, the all case law construing the different statutory
19 language in 353(b)(1) were adopted, and this is different from
20 what's in the face of the definitional section, 353(f).

21 It tells you for purposes of subparagraph (a), which
22 is the phrase lawful written or oral order of a licensed vet,
23 an oral -- an order, excuse me, is lawful if the order, one, is
24 a prescription or other order authorized by law; it is if an
25 oral order promptly reduced to writing by the person lawfully

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1 filling the order and filled by that person, yadda, yadda.

2 So what this is doing, the phrase "other order
3 authorized by law" is a recognition that different states have
4 different regulations for veterinarians as to what constitutes
5 a lawful -- a way a vet can dispense drugs, whether by
6 prescription or otherwise.

7 So given that the phrase "valid prescription" is going
8 to be out of clause (iv) on page 24, we should -- if we're
9 going to embark on the task of defining the phrase, lawful
10 written or oral order of a licensed vet in the course of the
11 vet's professional practice, and assume that language on page
12 26 should track the statutory language defined or it should
13 just come out. That's my objection.

14 THE COURT: Your objection is noted. So I want the
15 first paragraph to track the language about a "valid oral or
16 written order." When you come down several lines -- one, two,
17 three, four, five, six lines -- "pursuant to a valid
18 prescription" take out the word "prescription" and say "order
19 of the veterinarian."

20 MR. FERNICH: Wait. I'm sorry, I lost you, Judge.

21 THE COURT: Paragraph on page 26 to which you object,
22 I'm making the following edit. The first line is not going to
23 say "prescription;" it's going to say "a valid oral or written
24 order of a veterinarian is," and pick up with what's there.

25 Coming down to the sixth line that begins "pursuant to

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1 a valid prescription" that will be changed to read "pursuant to
2 a valid order of a veterinarian" as it's just been defined up
3 above.

4 MR. FERNICH: Okay.

5 THE COURT: "To dispense a prescription drug without a
6 valid order means" and then the next line "to administer to an
7 animal with no oral or written order at all, or pursuant to an
8 order that is invalid because it was not issued for a
9 legitimate medical purpose based upon a bona fide
10 veterinarian-client/patient relationship." I do have to say
11 that that seems a little redundant, but it is --

12 MR. FERNICH: It's redundant because the VCPR
13 requirement is applicable to 21 U.S.C. 360(b) about off --
14 extra-label use. So that's how the VCPR context enters into
15 both the statute and the implementing regulations in the CFR.

16 The CFR provision 21 CFR 530, et seq, that Dr. Bowman
17 was testifying about, that deals with extra-label drug use
18 under what I said the other day, the AMDUCA. The VCPR concept
19 does not pertain with respect to the charged 353(f) violation.
20 He's also charged with 360(b) violation, and certainly the VCPR
21 definition pertains with respect to that, but this language
22 here, what we're discussing in 24 and 26 -- and just to back up
23 a second.

24 The 360(b) violation is the adulteration charge. The
25 353(f) charge is principally the misbranding charge, and that

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1 doesn't fold in the concept of a VCPR. It just talks about a
2 lawful or written -- excuse me, I'm so sorry -- to the lawful
3 written or oral order of a licensed vet. And none of this
4 stuff about validity comes into play. It's just a lawful
5 order, and it defines what the lawful order is. It's either a
6 prescription or other order authorized by law.

7 So I'm not trying to be difficult about this at all.
8 It's just that the statutory is quite complicated, and both
9 prior to receiving the charge and in analyzing the request to
10 charge, I tried to do some hard looking. And I just think
11 what's happening here, not purposefully, is that there's mixing
12 and matching going on from other charges, other cases.

13 And when you look at the vet cases that we cited in
14 the request to charge, which is the one that began with Sloan,
15 which is Hebert, H-e-b-e-r-t, from Louisiana, and which is
16 Rojas from PA, none of this stuff comes in there about a valid
17 prescription, at least not in a 353(f) context. What they did
18 was they took the government --

19 THE COURT: All right. I don't need to hear what they
20 did in the other case.

21 MR. FERNICH: No, no, no --

22 THE COURT: Factually, Rojas is not this case. It
23 just isn't, and you're agreeing with that.

24 MR. FERNICH: Yes, I do understand that, but the point
25 is that when there's a charged 353(f) violation, that's

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1 distinct to veterinarians, and none of the cases that has
2 353(f) charge as applied to a vet, never used this kind of
3 language because this language is -- if your Honor were to look
4 at 353(b), right there, take a few minutes and look at the
5 difference of the statutory language. 353(b) for medical
6 doctors, the prescription is in. Everything has to be done
7 under a prescription.

8 MS. MORTAZAVI: Your Honor, may I interject on this
9 point? I believe the Court has already ruled that we are
10 taking out the language "prescription" and replacing it.

11 THE COURT: Yes.

12 MS. MORTAZAVI: So maybe Mr. Fernich is comforted by
13 that ruling.

14 THE COURT: It was an attempt to address your
15 objection; so you have my ruling. That's where we're at.

16 MR. FERNICH: I don't want to --

17 THE COURT: These are definitions, and they do not
18 say, in the definitional section, this one applies to this
19 charge and this one applies to that charge. They're simply
20 saying when these expressions or terms are used in the charges,
21 here's what they mean. So that's where we're at on that one.

22 Let me just see. You still need to look at the
23 question of "and/or" on page 26.

24 MR. FERNICH: If we're past my objection --

25 THE COURT: Yes.

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1 MR. FERNICH: If you recall how this came about, first
2 of all "or" is right, and if you recall how this came about,
3 the government on Friday said, well, the SG wants us to put in
4 "administering" as well, which is the Rojas issue; so
5 ostensibly, it's because that's what the SG wanted. There's no
6 claim in this case that Fishman administered anything.

7 THE COURT: No, but there are claims, I think, that,
8 is it, Geoff or Vernon --

9 MS. MORTAZAVI: Correct.

10 THE COURT: -- administered and he's a veterinarian,
11 right?

12 MS. MORTAZAVI: And there are other veterinarian
13 clients, your Honor, that we talked about over the course of
14 this.

15 THE COURT: Right.

16 MR. FERNICH: I don't have a problem --

17 THE COURT: But you both agree it should be "or."

18 MS. MORTAZAVI: Correct.

19 MR. FERNICH: No. I do.

20 THE COURT: Okay. Coming over to charge No. 11.
21 Okay. I think I moved your good faith defense to the end here
22 saying "The defendant has argued that he acted in good faith,"
23 but I have made a substantial revision, which I do think,
24 frankly, is substantive to this.

25 I do not think it's correct to say -- it is correct to

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1 say the burden always stays on the government. It is correct
2 to say that the government doesn't have to prove his good
3 faith, but I don't think it is correct to say that the
4 government has to prove bad faith. I think the government has
5 to prove intent to defraud or mislead. So I've made that edit.

6 MR. FERNICH: Can I just have one second to finish
7 reading it?

8 THE COURT: Sure.

9 (Pause)

10 MR. FERNICH: That language seems unobjectionable to
11 me.

12 THE COURT: Okay.

13 Coming over to No. 16, I told you when we were in
14 chambers that I was including the conscious avoidance charge,
15 and it's in what we've given you -- I'm sorry, I skipped No.
16 14, the lesser-included offense. The beginning part of it --
17 I'm sorry, the second paragraph, line 2, to me when I read it
18 through, it reads a little bit confusing, and I'm going to make
19 the following edits: "You must first consider whether the
20 government has satisfied its burden as to all elements of a
21 conspiracy to adulterate or misbrand drugs other than the
22 intent to defraud or mislead," and then the rest of it will
23 remain the same.

24 MS. MORTAZAVI: No objection from the government.

25 MR. FERNICH: None.

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1 THE COURT: "None" meaning no objection?

2 MR. FERNICH: No objection.

3 THE COURT: Okay. 18 and 19, our chambers staff had a
4 question thinking these seemed a bit repetitive. As I
5 understand what you're saying in 18 is the span of the
6 conspiracy itself, whereas in 19, you're talking about overt
7 acts that are laid out; is that correct?

8 MS. MORTAZAVI: That's correct, your Honor.

9 THE COURT: All right. And these are consensual, 18
10 and 19?

11 MR. FERNICH: You know, as a defense lawyer we don't
12 like these charges, but they are standard charges; so I can't
13 go against them.

14 THE COURT: No. 24, credibility, we pulled in the
15 false-in-one aspect charge into the credibility charge, which
16 is where I firmly believe it belongs. We left the concept
17 where you had stuck it at the back about cooperating witnesses,
18 but it seems to me it belongs in the witness credibility
19 section as well. So if you look at the last two paragraphs,
20 we've added those.

21 MS. MORTAZAVI: No objection from the government.

22 MR. FERNICH: No objection, your Honor.

23 THE COURT: Okay. And then I'll point out to you
24 where the shorter version of it remains in the back, okay?

25 Charge No. 28 is where we added the reminder about

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1 Ms. Giannelli not being here.

2 MS. MORTAZAVI: No objection from the government.

3 MR. FERNICH: No, no objection.

4 THE COURT: No objection? I'm sorry?

5 MR. FERNICH: No objection.

6 THE COURT: All right. Thank you.

7 Next, 29 is where you had had the totality of the
8 false-in-one aspect charge; so we've left, you will see, the
9 last sentence -- actually, read the last full paragraph. It's
10 slightly revised from the way you gave it to me, but the last
11 sentence captures that concept.

12 MS. MORTAZAVI: No objection from the government.

13 MR. FERNICH: In the penultimate sentence, where you
14 say "you should accept it as credible and act upon it
15 accordingly" --

16 THE COURT: Yes.

17 MR. FERNICH: I'd prefer, or be more comfortable with
18 "you may accept it as credible."

19 THE COURT: Right. Is the same not true of the first
20 sentence then?

21 MR. FERNICH: This is an abridged -- am I correct that
22 this is a shorthand reiteration of false in one, false in all?

23 THE COURT: Yes. And you're suggesting what,
24 Mr. Fernich? It says "may."

25 MR. FERNICH: I take your point, Judge. In the

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1 penultimate sentence, I prefer "you may accept it as credible
2 and act upon it accordingly," and to your Honor's point, the
3 cross of that is, "If you find that the testimony was false,
4 you may reject it."

5 THE COURT: Ms. Mortazavi?

6 MS. MORTAZAVI: So long as it's consistent, the
7 government has no objection.

8 THE COURT: Okay. So I will make the following edits.
9 First line: "If you find that the testimony was false, you may
10 reject it. If, however, after a cautious and careful
11 examination of the cooperating witness' testimony and demeanor
12 on the witness stand you're satisfied that the witness told the
13 truth, you may" -- not "should" -- "accept it as credible and
14 act upon it accordingly. As with all witnesses, you may accept
15 some but not all of a witness' testimony and give it whatever
16 weight you deem appropriate."

17 MS. MORTAZAVI: That's fine, your Honor.

18 MR. FERNICH: Yes.

19 THE COURT: Okay. "Yes" means no objection?

20 MR. FERNICH: No objection.

21 THE COURT: All right. Coming over next, I believe,
22 is that No. 37 is the charge about -- let me just find it. I
23 think that's the foreperson charge.

24 MR. FERNICH: Judge, just going back, I hate to do
25 that. So in the intent to defraud or mislead, the way we --

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1 THE COURT: Tell me a page or a charge, please?

2 MR. FERNICH: I think it was 11. This is about the
3 materiality. The way we settled it is we were going to put
4 "material" in there and leave it undefined; do I have that
5 right?

6 THE COURT: Yes. I believe that's what we've done,
7 right? Let me go back and look at that, but you're right, I
8 put that on the record in the robing room but not here.

9 MS. MORTAZAVI: Your Honor, I believe it's page 30.

10 MR. FERNICH: Yes.

11 MS. MORTAZAVI: And I believe it's "concealing
12 material facts" listed here, if that's what Mr. Fernich is
13 looking to.

14 MR. FERNICH: I'm trying to find it. As long as it's
15 in there, that's fine.

16 MS. MORTAZAVI: I think it's on 30.

17 MR. FERNICH: I'm on 30. What paragraph?

18 MS. MORTAZAVI: "To act with 'intent to mislead'" is
19 the opening phrase.

20 MR. FERNICH: Yup. Thank you.

21 THE COURT: Right?

22 MR. FERNICH: Yes.

23 THE COURT: By the way, on that one, I'm sorry I
24 didn't point this out as well. On No. 11, "other federal drug
25 enforcement authority," this is in the second-to-last

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1 paragraph, before we get to good faith --

2 MR. FERNICH: Yes.

3 THE COURT: -- comma, "including U.S. Customs and
4 Board Protection, the FBI and the DEA."

5 MR. FERNICH: Yes, that's consistent with the Court's
6 pretrial ruling.

7 THE COURT: Right. Addressing an objection that was
8 made by the government.

9 MR. ADAMS: Just one moment, your Honor?

10 THE COURT: Yes.

11 (Pause)

12 MS. MORTAZAVI: Your Honor, do I understand that
13 Mr. Fernich does not object to that paragraph in the
14 construction?

15 THE COURT: That's what I'm understanding him to say.

16 MS. MORTAZAVI: All right. And then nothing further
17 from the government on that.

18 THE COURT: Mr. Fernich?

19 MR. FERNICH: Right, without prejudice to the
20 objections raised in the motion to dismiss.

21 THE COURT: Right. Of course.

22 MR. FERNICH: Yes.

23 THE COURT: All right. So we were up to charge No.
24 37, which, as I said to you, is the foreperson charge; so
25 that's new. I told you I was going to add something, and I

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1 also put it in a different place than where I think it was or
2 you had suggested it would be.

3 MS. MORTAZAVI: Your Honor, just one thing that my
4 colleague has pointed out.

5 THE COURT: Sure.

6 MS. MORTAZAVI: There's a reference to the foreperson
7 that is contemplated by the Court and whether she's unable to
8 act in that capacity. The sentence that follows, "In that
9 event, your first order of business will be to elect a
10 foreperson."

11 THE COURT: Right.

12 MS. MORTAZAVI: You may just want to include "a
13 different foreperson" just for the sake of clarity.

14 THE COURT: Okay. Any objection, Mr. Fernich?

15 MR. FERNICH: No.

16 THE COURT: All right. We can do that.

17 Next, we added the charge about the verdict form.
18 That's No. 42. I'll give you a minute to read it, and then I
19 have a question for you all about the verdict form itself.

20 (Pause)

21 Any comments or objections?

22 MR. FERNICH: Not from the defense.

23 THE COURT: Thank you. I think the government is
24 still conferring.

25 MS. MORTAZAVI: Nothing from the government.

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1 THE COURT: Okay. So my question to you is the
2 following. This charge, which seems to be a pretty standard
3 one, contemplates that each of the jurors will sign the verdict
4 sheet, but the verdict form that you gave me, which otherwise
5 looks fine and is acceptable to the Court and I will use that
6 on consent, right, the verdict form, Mr. Fernich?

7 MR. FERNICH: Yes. Is it possible for Ms. Popper or
8 somebody, if it's not too much of an inconvenience, to print
9 one of those out and distribute it? It's just a lot easier for
10 me to look at.

11 THE COURT: Yes. I didn't make any changes; so I
12 didn't print a copy, but we'll try to do that.

13 MR. FERNICH: Yes.

14 THE COURT: My question to you is -- you don't really
15 need it in front of you -- don't we need signature lines?

16 MR. FERNICH: Yes.

17 MS. MORTAZAVI: Your Honor, our experience, just
18 speaking for the government, is that it's typically just the
19 foreperson that signs.

20 THE COURT: Oh, it is, but that's why the charge
21 needed to be changed.

22 MS. MORTAZAVI: We were discussing whether to point
23 that out. If it makes it simpler for purposes of the verdict
24 form formatting and also the jurors' time, just to have the
25 foreperson to sign. I think that's consistent with prior

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1 cases. The government, obviously, does not object to that.

2 MR. FERNICH: That's fine. We're going to poll them
3 anyway.

4 THE COURT: Yes, well, you're going to request that we
5 poll them, one side or the other.

6 All right. So then I'll take the sentence out that
7 says "Each of you should sign the verdict form." Okay?

8 MR. FERNICH: Yes.

9 THE COURT: I guess we have to say that the foreperson
10 should sign the verdict form? It just says the foreperson
11 should fill it in and note the date and time, and I'll say "and
12 sign the verdict sheet," right?

13 MS. MORTAZAVI: That's fine for the government, your
14 Honor.

15 MR. FERNICH: That's fine.

16 THE COURT: All right. No. 43, the conclusion, I have
17 edited them a little bit from the version you previously saw.
18 I added the last full paragraph, the fifth paragraph, "As you
19 deliberate, please listen to the opinions of your fellow jurors
20 and ask for an opportunity to express your own views. Every
21 juror should be heard. No one juror should hold center stage
22 in the jury room, and no one juror should control or monopolize
23 the deliberations."

24 I also added the language "Finally, I say this not
25 because I think it's necessary" -- this is at the very end,

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1 sorry -- "but because it is the custom in this courthouse to
2 say this: You should treat each other with courtesy and
3 respect during your deliberations."

4 And then the final paragraph asking them to just wait
5 while I hear from you at sidebar.

6 MR. FERNICH: I'm sorry, what was the text of the last
7 paragraph that your Honor was giving?

8 THE COURT: "Members of the jury, I ask your patience
9 for a few moments longer. It is necessary for me to send a few
10 moments with counsel and the reporter at the sidebar. I will
11 ask you to remain patiently in the jury box, without speaking
12 to each other, and we will return in just a moment to submit
13 the case to you. Thank you."

14 MS. MORTAZAVI: No objection from the government.

15 THE COURT: Mr. Fernich?

16 MR. FERNICH: Certainly no objection to the second
17 change to the last paragraph.

18 I'm not crazy about the paragraph that you inserted at
19 the bottom, that your Honor inserted at the bottom of 75.

20 THE COURT: Which paragraph is that?

21 MR. FERNICH: That is the one about as they
22 deliberate, please listen to the opinion of your fellow jurors.
23 That clause I have no problem with. There is a line of cases,
24 and I can't remember where I'm getting this from, that deals
25 with jurors who are -- who don't articulate and express

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1 themselves well, you know, have disagreements or tend to have
2 opinions but they may not be able to articulate them well and
3 they may not be able to speak. I'm a little uncomfortable to
4 ask for an opportunity to express your own views and every
5 juror should be heard.

6 THE COURT: Is it more palatable to you if I add the
7 word "ask for an opportunity to express your own views if you
8 wish to be heard"?

9 MR. FERNICH: Yes, that's more palatable.

10 THE COURT: Government?

11 MS. MORTAZAVI: That's fine for the government, and
12 perhaps then you could strike "every juror should be heard,"
13 given Mr. Fernich's objection.

14 THE COURT: Yes. Is that acceptable, Mr. Fernich?

15 MR. FERNICH: Yes.

16 THE COURT: Does that address your concern?

17 MR. FERNICH: Yes.

18 THE COURT: And what about the last sentence?

19 MR. FERNICH: I'd like to stop it right after what
20 your Honor just added.

21 THE COURT: I'm fine with that. Ms. Mortazavi?

22 MS. MORTAZAVI: So is the government.

23 THE COURT: Okay. And then the other two additions,
24 Mr. Fernich, you're fine with them?

25 MR. FERNICH: The one with the last paragraph,

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1 "Members of the jury," et cetera?

2 THE COURT: "Finally, I say this not because it's
3 necessary," which I read into the --

4 MR. FERNICH: That's fine.

5 THE COURT: All right. Then charge 44 about the
6 alternates is also new. I told you I'd be proposing language.

7 (Pause)

8 MS. MORTAZAVI: No objection from the government.

9 MR. FERNICH: No objection either.

10 THE COURT: All right. The only question I'll ask you
11 all to just pause for the moment on the alternates is to make
12 sure -- we had an incredibly attentive jury. They've been
13 fairly punctual every day. They all seem engaged. I have no
14 reason to anticipate any issues, but are you all comfortable
15 with letting all four alternates go and be on call, as opposed
16 to keeping two of them around?

17 MS. MORTAZAVI: The government has no objection to
18 releasing all four alternates.

19 THE COURT: Mr. Fernich?

20 MR. FERNICH: No objection either.

21 THE COURT: Okay. That's what we'll do then.

22 So I think with the exception of charge No. 10, which
23 we're going to look at one more time, or you're going to talk
24 about and get me your versions -- and you better make sure
25 you're filing what you need to on ECF so that the record is

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1 what it is. If you can agree on 10 with my rulings, great. If
2 you can't, you can each note your comments and preserve them
3 for the record.

4 MR. FERNICH: Well, I think your Honor has resolved
5 adversely to me the objection to the inclusion of that
6 paragraph on 26 defining, I think the phrase was, "valid
7 prescription" so --

8 THE COURT: Yes, but it's not going to stay that way.
9 I suggested you go back and you edit it to conform with what we
10 talked about on the record, but yes, a paragraph should remain
11 in.

12 MR. FERNICH: Okay. Let's see if we can put our heads
13 together and resolve it. I think your Honor's ruling has
14 substantially narrowed the issue.

15 THE COURT: I thought so. Okay. All right. It's
16 noontime now. Mr. Fernich, I don't know how Mr. Sercarz is
17 going to be communicating with you, but I --

18 MR. FERNICH: I'll reach out to Mr. Sercarz.

19 THE COURT: Should we tentatively say we'll resume at
20 1:30?

21 MR. FERNICH: Oh, sure.

22 THE COURT: You think you'll have feedback by then?

23 MR. FERNICH: Whether he'll be back?

24 THE COURT: No, "feedback" I said.

25 MR. FERNICH: Oh, yes, I'm hopeful.

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1 THE COURT: Okay. Does that work for the government?

2 MR. ADAMS: Yes, your Honor.

3 THE COURT: Is there anything else we should talk
4 about?

5 MR. FERNICH: Oh, could I just have one second to just
6 look at the verdict form?

7 THE COURT: Yes, of course.

8 MR. FERNICH: Thanks.

9 THE COURT: And then I do have one question.

10 (Pause)

11 MR. CHOW: Your Honor, if I may bring up one question
12 for the Court?

13 THE COURT: Yes. Maybe just let him finish reading.
14 He hasn't had a chance. "He" being Mr. Fernich. I don't mean
15 to be disrespectful.

16 (Pause)

17 MR. FERNICH: The verdict sheet is fine.

18 THE COURT: Thank you. All right. And the
19 government, obviously, is fine with the verdict sheet, since
20 you sent it to me.

21 MS. MORTAZAVI: Yes, your Honor.

22 THE COURT: But I think that was after consultation,
23 right?

24 MR. FERNICH: Yes.

25 MS. MORTAZAVI: Correct.

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1 THE COURT: Mr. Chow?

2 MR. CHOW: Your Honor, I was just curious as to
3 whether the Court had any practice or intent with regard to
4 instructing the jurors with regard to their schedule of
5 deliberations?

6 THE COURT: Get a little closer.

7 MR. CHOW: I know that some courts tell the jurors,
8 jury, that they are permitted to perhaps stay late or whatever
9 with regard to their deliberation schedule. I was just
10 wondering if the Court had an idea as to how it intended to
11 instruct the jury with regard to their workday.

12 THE COURT: I hadn't thought about it, to be perfectly
13 honest. I'm open to recommendations. My instinct is to leave
14 them to their own preference. We've had a pattern where we
15 break around 4:30 each day. I would assume, based on that
16 pattern, that they will assume that that's how they're going to
17 proceed but, of course, I guess I should tell them, should they
18 wish to stay longer, that they may.

19 MR. CHOW: The government's position is we're happy to
20 work as long as the jury is willing to work. We are happy to
21 stick around.

22 THE COURT: Yes, but I mean, I think that I, when they
23 are retiring, will say to them that they will let us know when
24 they are concluding their deliberations for the day and that
25 should they wish to stay past the 4:30 hour, which is when

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1 we've been ending each day, they're free to do so.

2 MR. CHOW: Great.

3 THE COURT: They should just let us know.

4 MR. CHOW: Thank you.

5 THE COURT: Mr. Fernich?

6 MR. FERNICH: No objection.

7 THE COURT: Okay. All right. Mr. Adams, the question
8 I had for you is, is the order that I signed earlier filed
9 under seal?

10 MR. ADAMS: Not normally, your Honor. I don't think
11 there's anything on the face of that document that requires it
12 to be under seal.

13 THE COURT: Mr. Fernich?

14 MR. FERNICH: I agree with -- can we do this at the
15 sidebar for a minute?

16 THE COURT: Sure.

17 (Pages 1144 through 1146 SEALED by order of the Court)

1 (In open court)

2 THE COURT: All right. So we stand in recess then
3 until 1:30, correct?

4 MR. ADAMS: Correct.

5 MS. MORTAZAVI: Yes, your Honor.

6 THE COURT: All right. Have a good lunch break,
7 everyone. Thank you.

8 (Luncheon recess)

9 (Continued on next page)

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AFTERNOON SESSION

(1:35 p.m.)

(In open court)

THE COURT: I'm going to wrap up the jury instructions before we adjourn inside for an update.

So I want to comment on one thing. With respect to the supplemental defense request to charge that were submitted on the 28th, which I believe was Friday --

MR. FERNICH: Yes.

THE COURT: -- I just want to clarify with you, Mr. Fernich, that Request No. 3 is withdrawn in light of our adding the language about the need for the nexus.

MR. FERNICH: Yes.

THE COURT: And that Request No. 4 is withdrawn -- requested Request No. 4 is withdrawn in light of the inclusion of the lesser included offense charge.

MR. FERNICH: Yes.

THE COURT: Okay. So I want to just clarify or supplement the record, I should say, a little bit with respect to your second supplemental charge, which I have said I am not going to give.

MR. FERNICH: Judge, I don't mean to interrupt, before we get there, which is totally fine, I understand your need to make a record, I appreciate it, I just had one issue and I appreciate the government's good work, in the letter that was

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1 just filed, which is --

2 THE COURT: Hold that, I will get to it.

3 MR. FERNICH: All right.

4 THE COURT: With regard to your second supplemental
5 request to charge from the 28th, as I understand it, I told you
6 I'm not giving that charge, but I want to be clear for the
7 record about why.

8 So as the Court understands it, the government's
9 theory of the case is that the intent to defraud or mislead
10 racing authorities goes hand in glove with the intent to
11 defraud the FDA because the custom drugs that Dr. Fishman
12 intended to enhance the performance of racehorses, drugs whose
13 purpose was only to gain a competitive advantage, as you put
14 it, would not and could not be approved or found to be
15 generally recognized as safe and effective.

16 So as I understand it, on the government's theory, for
17 which it has adduced some evidence, Dr. Fishman intended to
18 evade the scrutiny of both federal and state regulators.

19 The theory that you articulated to me, Mr. Fernich, on
20 Friday, is that Dr. Fishman did intend to defraud state racing
21 authorities but simply had no intentions or thoughts about the
22 FDA. I don't find that that theory is supported by the record,
23 that Dr. Fishman had no thought or intention about the FDA
24 whatsoever because evidence has been received to the effect
25 that Dr. Fishman discussed the FDA and FDA approval status of

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1 another company.

2 Nevertheless, at the end of the day, it is obviously
3 for the jury to decide whether the evidence supports the
4 government theory or your theory or to find that Dr. Fishman's
5 state of mind was different from either of those two theories,
6 including that he had no intent to defraud anyone. But I'm not
7 going to instruct the jury as a matter of law as you request
8 that I do, that an intent to defraud state racing authorities
9 is inherently distinct from an intent to defraud the FDA.

10 So now with respect to the government's letter --

11 MR. FERNICH: Could I be heard on that one for second?

12 THE COURT: Sure.

13 MR. FERNICH: I understand the Court's position and I
14 understand the Court's ruling. Just for the record, I am not
15 at all saying that's inherently distinct, I'm saying if the
16 charge says that if the jury found only, only that he intended
17 to defraud regulators for purposes of competitive advantage,
18 that would suffice. That would compel an acquittal, not that
19 it's inherently distinct.

20 The government is free to make the argument that your
21 Honor just articulated, and it's a very plausible argument.
22 Nonetheless, there's a plausible reading of the record that
23 could suggest that all Dr. Fishman cared about was winning
24 races, that was uppermost in his mind, he didn't care one whit.
25 I'm not saying that the jury has to accept that claim, but it's

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1 a claim that we could make and they could accept or reject.
2 That's all I wanted to do. And there's evidence in the record
3 that supports that view as well.

4 And for that reason, given the complexity of the
5 charges here, I think the charge is supported in law and I
6 think there's an adequate record foundation for it, but I don't
7 want to belabor it. We know where we each respectively stand
8 and I appreciate the Court's ruling.

9 THE COURT: Fair enough. You have your record.

10 Now the final open issue on jury charges -- and I'm
11 not reopening this for debate, I'm telling you where I'm come
12 coming out on it.

13 You appear to be telling me, Mr. Fernich, that the
14 letter from the government is not on consent, is that correct?

15 MR. FERNICH: It is on consent, subject to exactly
16 what Mr. Chow faithfully wrote there, that I don't want that
17 paragraph at all.

18 THE COURT: You made that clear.

19 MR. FERNICH: If the Court is going to give that
20 paragraph, I think this is the accommodation that the parties
21 have reached. My only -- and this only became clear to me when
22 the two clauses about administering and dispensing were broken
23 into separate sentences, if we're going to give a separate
24 sentence on administering after the word "by," I wanted "or
25 under the supervision of a licensed veterinarian," but other

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1 than that, I think we do agree, yes.

2 THE COURT: All right. I will consider your "under
3 the supervision" language in a moment, but I do not find this
4 language acceptable because I think the first sentence is just
5 not right. Prescription animal drugs are misbranded if they
6 are not administered by a licensed veterinarian in, you're
7 missing, the course of his professional practice. That's just
8 not true because they might be administered by somebody other
9 than a licensed veterinarian pursuant to a valid written
10 prescription.

11 So here's what I'm going to charge -- and do we have a
12 copy or no?

13 LAW CLERK: Yes, Judge, I handed out copies.

14 THE COURT: If you look at page 26 --

15 MR. FERNICH: This is on the charge that your Honor
16 handed out earlier in the day?

17 THE COURT: No, what was just handed out by Ms. Popper
18 after the lunch break which reflects what I'm doing with your
19 proposal.

20 MR. FERNICH: Okay.

21 THE COURT: First full paragraph on page 26.

22 MS. MORTAZAVI: Your Honor, the government is fine
23 with that language, and captures the two categories that the
24 government understands are carve outs from what would be a
25 misbranded prescription animal drug.

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1 MR. FERNICH: Sorry, I need just a little more time, I
2 apologize.

3 THE COURT: No problem, Mr. Fernich, but I put in two
4 sentences.

5 MR. FERNICH: I see that.

6 Yes, subject to that I didn't want any of this
7 paragraph, this language is fine.

8 MS. MORTAZAVI: Your Honor, I apologize, I took
9 another look at this language, and it occurred to me that a
10 drug would still be misbranded if someone other than a
11 veterinarian administered it but not pursuant to a valid
12 prescription.

13 Now Mr. Fernich objected to the use of the term
14 "valid," and so in the sentence that precedes that category,
15 that is when a veterinarian directly administers a prescription
16 animal drug, we have included "not in the course of his
17 professional veterinary practice." I think there has to be
18 some mention of that in the sentence that follows to show that
19 an invalid prescription, that is one not given to a client in
20 the course of a veterinarian's professional practice, would
21 still result in a drug being misbranded.

22 So in other words, if a vet --

23 THE COURT: I understand what you're saying. I
24 thought we captured that concept.

25 MS. MORTAZAVI: And I believe because the term "valid"

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1 was removed, it becomes a little more ambiguous.

2 MR. FERNICH: So you want to add, Sarah, at the end,
3 "not in the course of his professional veterinary practice."

4 MS. MORTAZAVI: Correct.

5 MR. FERNICH: I don't have a problem with that.

6 THE COURT: Okay. Let me just -- but not pursuant to
7 a prescription or other order authorized by law.

8 MR. FERNICH: Issued in the course of his professional
9 veterinary -- of the veterinarian's veterinary practice.

10 THE COURT: Ms. Mortazavi?

11 MS. MORTAZAVI: That addition satisfies the
12 government's concern. Thank you.

13 THE COURT: We will put that in, and you have your
14 objection to the paragraph wholesale.

15 MR. FERNICH: I appreciate that.

16 THE COURT: The other edits from this morning are as
17 follows, page 61, we changed the May -- sorry, the "should" to
18 "may" in two places, as we discussed.

19 MR. FERNICH: Yes.

20 THE COURT: On the foreperson charge, No. 37 on page
21 69, I have made the following additional edit where you
22 proposed earlier that in the event Juror No. 1 doesn't want to
23 fulfill that role, their first order of business will be to
24 elect a different foreperson. I changed it: Will be to elect
25 a different juror as the foreperson. Because if she doesn't

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1 want to do it, she's not the foreperson. Okay?

2 MR. FERNICH: No objection.

3 MS. MORTAZAVI: No objection.

4 THE COURT: On page 74, the verdict form, as we
5 discussed and on consent I took out the language that all the
6 jurors needed to sign.

7 And in the conclusion, we edited that paragraph
8 pursuant to largely Mr. Fernich's request but some of it was on
9 consent of the government, so it now reads: As you deliberate,
10 please listen to the opinion of your fellow jurors and ask for
11 an opportunity to express your own views if you wish to be
12 heard.

13 MR. FERNICH: No objection.

14 MS. MORTAZAVI: No objection.

15 THE COURT: Okay. So that is the final charge then.

16 All right. Tomorrow we will resume at 10 o'clock with
17 the jury and we'll begin with the government's summation.

18 MS. MORTAZAVI: Thank you, your Honor.

19 THE COURT: Then we'll move to you, Mr. Sercarz, then
20 we move to -- well, probably at that point break for lunch and
21 do the rebuttal and the charges.

22 We have some matters we need to discuss in the robing
23 room. Thank you everybody for all the hard work on this.

24 (Continued on next page)

(Pages 1156 through 1188 SEALED by Order of the Court)

25 (Adjourned to February 1, 2022, at 9:15 a.m.)